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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 745

PAUL DE LUCIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

FURTHER REPLY

to Government's Brief in Opposition

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May It Please The Court:

Fearing that our petition for certiorari might have been presented without it, we hurriedly submitted our "Reply to Government's Brief in Opposition". We believed it important that Your Honors be reminded of other cases recently argued. Cases involving the *Jencks* case rule. Since the filing of our Reply we have examined the briefs

in some of those cases and now beg leave to present this further reply, in order to prevail upon Your Honors, if possible, to include the case at bar in the matter of interpretation of the law applicable. As may be expected each case coming to Your Honors presents its own factual background. It is our respectful contention that the Government has been able to defend its position in each of the other cases, because of facts in those cases not present in the case at bar. We submit that the *De Lucia* case presents questions squarely, which questions require an answer, sooner or later, for the guidance of the lower courts. The trial Judge said, after an examination of the withheld document, that if he thought it would do us any good he would order its delivery. The trial Judge undertook to decide upon the value of the withheld document. Please again see our petition for certiorari, pp. 136 to 146. We do not believe that the right of any trial judge to do this has been as squarely presented in any of the other cases argued before Your Honors.

In *Holland* v. *United States,* 348 U.S. 121, 124, Mr. Justice Clark said, concerning previous cases:

> "We have denied certiorari because the cases involved only questions of evidence and, in isolation, presented no important questions of law."

Your Honors will agree no doubt, that cases should not be decided in isolation, especially where other cases are on the docket. The Government Attorneys should not be allowed to divide and conquer if any such motive was present in their requests for continuances in the case at bar. To divide may be good strategy, if it were the duty of the Government Attorneys to win at all costs. But as Your Honors have said in *Jencks,* 353 U.S. 657, 668, quoting from *Berger*:

"For the interest of the United States in a criminal prosecution is not that it shall win a case but that justice shall be done."

In the case at bar important questions have been presented concerning what might constitute justice. A number of cases have been presented and argued before Your Honors involving related questions. We respectfully submit that the case at bar should be included, before Your Honors reach a decision in the previous cases.

We respectfully submit the following observations concerning the previous cases, in support of our contention that the case at bar should be included by Your Honors in the group, before final decision.

Nos. 435-436-437, Harry Lev v. United States.

The record shows that at the time of the trial the prosecutor did not have in his possession the document made the subject of controversy before Your Honors. The case was tried before *Jencks*. After it reached the Court of Appeals the prosecutor submitted an affidavit in that court, including the controversial statement, which statement was submitted to the Court of Appeals *in camera*. The Government before Your Honors has argued that the error, if any (of non production at trial), was harmless under the circumstances of the case. The Government has put the question, in part, as follows, p. 3, Brief on the merits:

> "3. Whether it was error, under *Jencks* v. *United States*, 353 U.S. 657, for the trial court to deny the request of one defendant for production of what proved to be the summary of a Senate investigator's interview with a witness, where the document had not been seen or approved by the witness and was not then in the possession of the prosecution."

"4. Whether it was reversible error to deny the request for production of the Senate investigator's summary where the testimony of the witness was secondary and largely admitted by the defendant making the request; where the testimony of the same witness before the Senate Committee was available to the defense and was used for impeachment purposes; and where the guilt of all the defendants was proved by overwhelming evidence from other sources."

The defendant in the *Lev* case submitted, among others, the following questions, which we copy from the *Lev* Petition for Certiorari, p. 3:

"6. Are not summaries and reports of prior statements made by witnesses to a government investigator available to the defendant under the provisions of Title 18 U.S.C., Section 3500?"

"7. Does Title 18 U.S.C. Section 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?"

Rubin, a co-defendant in No. 437, submits one of the questions involved as follows:

"(2) Whether the Court of Appeals was correct in designating the trial court's concededly erroneous ruling as 'harmless error' because of the enactment of the supervening statute enacted by Congress (18 U.S.C. Sec. 3500(a)(b)(e)(1)(2)) as an aftermath of the decision of the Supreme Court of the United States in *Jencks* v. *United States* (353 U.S. 657)."

The obvious differences between the *Lev* case and the *De Lucia* case are respectfully pointed up, briefly, as follows: In *De Lucia*

(a) The trial was had after *Jencks* and after § 3500 was enacted.

(b) The withheld document in *De Lucia* was in the possession of the prosecutor, it had been seen and signed, we believe, by the witnesses appearing at the trial.

(c) The document reflected the opinion of an expert witness, Stonesifer, who furnished his opinion before the trial jury concerning an important issue and which opinion, given at the trial, we believe, was contrary to the opinion expressed in the document.*

We respectfully submit that the circumstances of the *Lev* case may not squarely present the following questions; which questions we copy from our Petition for Certiorari, No. 745, in the *De Lucia* case:

(1) If § 3500 had not been enacted would it have been error for the Court to refuse to require delivery of the papers on the ground stated, *i.e.*, that they could have been of no value to the defense?

(2) If the answer to (1) is yes, the question arises, was it error to refuse, after application of § 3500?

(3) If it would have been error under the *Jencks* case and not error under § 3500, has Congress the Constitutional power to change the practice in the light of that decision?

(4) In view of the fact that the Government was obliged to prove the materiality of certain statements and the Court took this question from the jury by instruction, after an inspection *in camera*, does not this amount to conviction on evidence not heard or seen by petitioner?

No. 451, Rosenberg v. United States.

Your Honors limited the grant of certiorari to the following question which we copy from the Government Brief, p. 2:

"Is the rule of this Court in *Jencks* v. *United States*, 1957, 353 U.S. 657, a rule of mere procedure, or does

*We have not seen the document. We conclude from all of the circumstances of the case, including the refusal of the prosecutor to deliver it, that the document does in fact contradict the witness.

it involve a defendant's constitutional rights? May a clear violation of this rule be harmless error? May the conceded error of a trial court in withholding from defense counsel prior statements of principal Government witnesses be excused because a Circuit Court finds that the defense was not hampered in cross-examination of those witnesses? Is it proper for a Circuit Court to determine what use defense counsel might have made of statements erroneously withheld?"

We quote further from the Government Brief, p. 2:

> "As phrased, this question assumes several matters which we dispute, such as a violation of the *Jencks* rule and an alleged conceded error. In our view, the questions presented are as follows:
>
> 1. Whether it was proper for the trial court to examine *in camera* documents produced by the United States Attorney to determine whether they were the kind of documents which should be turned over to the defense under *Jencks* or 18 U.S.C. 3500.
>
> 2. Whether petitioner should have been permitted to examine the statments of government witnesses prior to trial."

In the *De Lucia* case no demand before trial was made. The request for the document was made after the witnesses had taken the stand and had given their direct testimony. The prosecutor and the Trial Judge assumed that the document was the kind of document covered by 18 U.S.C. § 3500 and made use of the authority found by them in the statute, by virtue of § 3500, to deny the request for inspection.

Nos. 489 and 491, Pittsburg Plate Glass Co. v. United States, Galax Mirror Co. v. United States.

The question presented here to Your Honors involves the Grand Jury testimony of a Government witness.

The Attorneys for *Galax*, Brief p. 3, have put the question as follows:

> "Whether the denial of defendants' motion at the trial for production of the relevant grand jury testimony of the principal prosecution witness for purposes of cross examination constituted error?"

The Court of Appeals, 260 F. 2d 397, 402, said:

> "The defendants at no time requested the judge to make a preliminary inspection of the transcript to ascertain whether there was inconsistency. * * * it is now clear that the production of grand jury testimony is not governed by *Jencks*, nor by subsequent legislation, nor 18 U.S.C.A. § 3500, but by the Federal Rules of Criminal procedure 6(e), 18 U.S.C.A. which vests discretion in the trial court. (citing cases) * * * (404) The Court did not exceed the proper limits of the sound discretion vested in it by Rule 6(e)."

The *De Lucia* case did not involve the denial of access to Grand Jury testimony.

No. 471, Palermo v. United States.

We copy the question presented from the Government Brief, p. 1:

> "Whether it was error to refuse to allow defense counsel to inspect and use for cross examination a memorandum written by Government agents who had conferred with a witness for the prosecution, where such memorandum had not been signed by or exhibited to the witness and was not a substantially verbatim, contemporaneous recording of what the witness had said?"

We quote further from the Government Brief, p. 16:

> "Under the statutory procedure, a summary of prior oral statements prepared by the Government Agents, and which has not been approved by the witness, is not a 'statement' which must be produced for cross examination of such witness."

In the *De Luca* case the witnesses for the Government had taken the stand. We infer from the circumstances in evidence that these witnesses had executed the document withheld by the Court.

We respectfully submit the certiorari should be granted in the case at bar, before decision in the previous cases.

We respectfully submit that other questions have been submitted to Your Honors upon which certiorari should be granted, for reasons heretofore stated in our petition.

Respectfully submitted,

WM. SCOTT STEWART,
Attorney for Petitioner.